Supreme Court, U.S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

No. 79-1734

In the
Supreme Court of the United States
October Term, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

vs.

BERT TAYLOR, JR.,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Attorney for Amicus Curiae

The Scheffer Press, Inc.—(312) 263-6850

NO. 79-1734

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

v.

BERT TAYLOR, JR., Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT, BERT TAYLOR, JR.

TABLE OF CONTENTS

		Page
Table of Authorities		i
Statement of Interest.		vii
Summary of Argument.		1
ARGUMENT		5
I.	THE PETITIONERS' FAILURE TO RETURN THE HOBBY KIT TO THE RESPONDENT IS A CONSTITUTIONAL DEPRIVATION AND IS REMEDIABLE UNDER SECTION 1983.	5
II.	THE RESPONDENT HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW	18
III.	REGARDLESS OF THEIR VALUE, PROPERTY RIGHTS ARE PROTECTED UNDER THE CONSTITUTION AND UNDER SECTION 1983	24
IV.	THE PETITIONERS SHOULD BE HELD LIABLE FOR THE LOSS CAUSED BY THEIR NEGLIGENT SUPERVISION OF THE PRISON HOBBY SYSTEM. . . .	27
	A. Negligence Should Be A Sufficient Basis For Liability In These Circumstances.	27
	B. The Petitioners Negligently Supervised The Prison Mailing System	31
Conclusion		38

TABLE OF AUTHORITIES

Cases: Page

Alexanian v. N.Y. State Urban Corp., 554 F.2d 15 (2d Cir. 1977) 9

Baker v. McCollan, 443 U.S. 137 (1979) 27

Bell v. Wolfish, 441 U.S. 520 (1979). 8

Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972). 37

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 30

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). 13

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978). 26, 34

Bounds v. Smith, 430 U.S. 817 (1977). 6

Brown v. Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968). 22

Bunkley v. Watkins, 567 F.2d 304 (5th Cir. 1978). 16

Carey v. Piphus, 435 U.S. 247 (1978). 14, 29

Carlson v. Green, 446 U.S. 14 (1980). 30

Page

Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975). 10

Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975). 10

Clayton v. Shaw, 548 F.2d 1155 (5th Cir.), cert. denied, 434 U.S. 873 (1977). 15

Commercial Corp. v. N.Y. Barge Corp., 314 U.S. 104 (1941). 32

Cooper v. Pate, 378 U.S. 546 (1964) . 6

Cruz v. Beto, 405 U.S. 319 (1972) . . 6

Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973). 10

Davis v. Passman, 442 U.S. 228 (1979) 30

Demps v. Wainwright, 552 F.2d 192 (5th Cir. 1975). 9

Edelman v. Jordan, 415 U.S. 651 (1974) 18

Ellis v. Dyson, 421 U.S. 426 (1975) . 23

Ex Parte Young, 209 U.S. 123 (1908) . 17

Fayerweather v. Bell, 447 F.Supp. 913 (M.D. Pa. 1978). 32

Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980). 26

Fogal v. Genesee Hospital, 41 A.D. 2d 468, 344 N.Y.S.2d 552 (4th Department 1973). 33

Page

Fuentes v. Shevin, 407 U.S. 67 (1972) 14, 25

Gomez v. Toledo, 100 S.Ct. 1920 (1980) 29

Goss v. Lopez, 419 U.S. 565 (1975). . 19

Hansen v. May, 502 F.2d 728 (9th Cir. 1974). 9, 10

Hughes v. Washington, 389 U.S. 290 (1967) 13

Hutto v. Finney, 437 U.S. 678 (1978). 18

Ingraham v. Wright, 430 U.S. 651 (1977) 22, 23

Jensen v. Klecker, 599 F.2d 243 (8th Cir. 1979). 9

Lynch v. Household Finance Corp., 405 U.S. 538 (1972). 9, 24

Maher v. Gagne, 100 S.Ct. 2570 (1980) 25

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 36

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). . . . 19

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 35, 37

Monroe v. Pape, 365 U.S. 167 (1961) 23, 29

Navarro v. Chief of Police, Des Moines, 523 F.2d 214 (8th Cir. 1975). 37

Page

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) 25

Owen v. Independence, 445 U.S. 622 (1980) 22, 29, 30

Pritchard v. Perry, 508 F.2d 423 (4th Cir. 1975) 26

Procunier v. Martinez, 416 U.S. 396 (1974) 6

Quern v. Jordan, 440 U.S. 332 (1979). 18

Robertson v. Wegmann, 436 U.S. 584 (1978) 29

Robinson v. Hanrahan, 409 U.S. 38 (1972) 7

Russel v. Bodner, 489 F.2d 280 (3rd Cir. 1973) 10

Sell v. Parratt, 548 F.2d 753 (8th Cir.), cert. denied, 434 U.S. 873 (1977) 10

Southern Ry. v. Prescott, 240 U.S. 632 (1916) 35

State Marine Lines Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974). . . 15

Steffel v. Thompson, 415 U.S. 452 (1974) 23

Page

Taylor v. Parratt, No. 76-L-57 (D. Neb., Oct. 25, 1978) 31

Texas Pipe Bending Co. v. Gibbs, 580 S.W. 2d 41 (Tex. Civ. App. 1979). 33

United States v. General Motors, 323 U.S. 373 (1945). 14

United States v. Prescott, 44 U.S. (3 How. 57) 578 (1845) 17

Webb's Fabulous Pharmacies v. Beckwith, 49 U.S.L.W. 4033 (Dec. 9, 1980) 11, 12

Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1970), rev'd mem., 405 U.S. 1036 (1972). 9, 10

Wolff v. McDonnell, 418 U.S. 539 (1974) 6

Constitutions:

United States Constitution:

Fifth Amendment. 1, 11

Fourteenth Amendment 1, 5, 13 25, 26

Statutes:

28 U.S.C. §1343(3) 24

42 U.S.C. §1983. 1-38

Page

Miscellaneous:

Burger, Report on Federal Judicial Branch-1973, 59 A.B.A.J. 1125 (1973) 8

W. Prosser, Handbook of the Law of Torts, (4th Ed. 1971). 33, 35

With the consent of the Petitioners and the Respondent, the Mandel Legal Aid Clinic submits this brief as amicus curiae in support of the Respondent, Bert Taylor, Jr.

STATEMENT OF INTEREST

The Mandel Legal Aid Clinic, in existence since 1959, has been dedicated to protecting against and remedying, deprivations of constitutionally protected rights. The Clinic has represented prisoners, mental patients, and others who have been institutionalized against their will and forced to turn over their property to the custody of the state. It is important that this area of the law be clarified so that those institutionalized by the state can receive prompt and just compensation.

SUMMARY OF ARGUMENT

Mr. Taylor's Fifth and Fourteenth Amendment rights were violated when the Warden and Hobby Manager of the Nebraska Penal and Correctional Complex did not return his hobby kit or give him $23.50 (the undisputed value of the hobby kit). The State of Nebraska, through its prison officials, confiscated Mr. Taylor's hobby kit in 1975 until he was released from disciplinary segregation. Whenever a state confiscates prisoner property, other than contraband, it is constitutionally required either to return the property or to pay the prisoner the value of the property. Here Nebraska has done neither.

Nebraska claims that it does not have custody of the hobby kit and does not know where it is or who has it.

It refuses, and has refused since 1975, to pay Mr. Taylor the undisputed value of $23.50. Everyone agrees that the kit was received by the prison and that the kit was never forwarded to Mr. Taylor. The Petitioners argue instead that Mr. Taylor must sue Nebraska and its officials in state court to obtain the $23.50. There they may assert Nebraska's statutory defenses since Nebraska has not fully waived its sovereign immunity. The Petitioners admit that Mr. Taylor tried several times to obtain his property through the administrative procedures of the prison. In each instance he was refused his property or its value. Then when he filed in the federal district court, Nebraska defended the suit there, appealed to the Eighth Circuit Court of Appeals and sought and obtained review by this

Court even though there has never been any dispute that Nebraska confiscated the hobby kit, the value is $23.50 and the hobby kit cannot be returned to the prisoner.

The State of Nebraska asserts that its motive is to keep the federal courts from becoming deluged with claims from prisoners involving disposition of their property. But this is simply the wrong case to make that argument because here the great waste of judicial resources is solely the result of Nebraska's unjustified and adamant refusal to return Mr. Taylor's hobby kit or pay him $23.50. Amicus asserts that at least in such circumstances due process has been violated and there is no need for resort to the state courts before seeking redress in the federal courts under 42 U.S.C. §1983.

The State of Nebraska undertook to provide a system to safeguard Mr. Taylor's property. Having taken Mr. Taylor's property, Nebraska was obliged either to return the property or pay for it. If the State refuses to pay, those who negligently cause the property to become lost or stolen should be held liable.

Supervisory liability should be imposed for negligently supervising the procedures and personnel responsible for keeping Mr. Taylor's hobby kit, particularly when other inmates are given this position of trust. Indeed this Court should uphold the trial court's finding that the Petitioners were negligent. It should be affirmed because it is based on the same logic and policy used to fashion the presumption of negligence under the doctrine

of res ipsa loquitur since the Petitioners did not come forward with any evidence to rebut the presumption of negligence.

ARGUMENT

I. THE PETITIONERS' FAILURE TO RETURN THE HOBBY KIT TO THE RESPONDENT IS A CONSTITUTIONAL DEPRIVATION AND IS REMEDIABLE UNDER SECTION 1983.

Amicus contends that prison officials who retain the property of prisoners in their custody have a constitutional duty either to return the property or to compensate the prisoner for his loss. The failure of prison officials to do so when there is no dispute about the rightful owner of the property is a deprivation and a taking in violation of the Fourteenth Amendment.

Though a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a

prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). In support of the proposition that prisoners retain their basic constitutional guarantees, §1983 actions have been upheld against prison officials who denied prisoners the freedom of religion, Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964); the right of access to the courts, Bounds v. Smith, 430 U.S. 817 (1977); the right to correspond by mail with outsiders, Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); and the right to procedural safeguards for the protection of liberty interests. Wolff v. McDonnell, 418 U.S. 539 (1974). The question before this Court is what protections are afforded to a prisoner's

property rights. Specifically, is a prisoner entitled to relief when prison officials fail to return property which they took and held as custodians?

Amicus does not contend that a prison official may never detain the belongings of a prisoner. Surely a guard may seize a prisoner's effects in order to maintain prison security and, indeed, Mr. Taylor does not complain that his hobby kit was illegally taken. Amicus rejects the notion, however, that a prisoner is divested of all property rights and, therefore, may be permanently deprived of his possessions.

This Court has indicated that the property of prisoners is given as much protection as the property of non-prisoners. For example, in Robinson v. Hanrahan, 409 U.S. 38 (1972),

it was held that a state may not institute a forfeiture proceeding against a prisoner without giving him adequate notice of the action. This Court reasoned that a prisoner is constitutionally entitled to the same quantum of notice as a non-prisoner when the state seeks to deprive him of his property. See Bell v. Wolfish, 441 U.S. 520, 557 n.38 (1979); Burger, Report on Federal Judicial Branch-1973, 59 A.B.A.J. 1125, 1128 (1973).

In Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1970), rev'd mem., 405 U.S. 1036 (1972), the Court of Appeals for the Fourth Circuit denied a §1983 claim to a prisoner who alleged a deprivation of property worth $3.52 on the grounds that deprivations of property were not remediable under §1983. Reversing and remanding

the lower court's decision, this Court instructed the lower court to consider Lynch v. Household Finance Corp., 405 U.S. 538 (1972), which had previously held that property deprivations are remediable under §1983. Other courts have inferred from the reversal in Weddle that property rights of prisoners are constitutionally protected and that the deprivation of those rights gives rise to a §1983 claim for relief. See Demps v. Wainwright, 522 F.2d 192, 194 (5th Cir. 1975); Hansen v. May, 520 F.2d 728 (9th Cir. 1974).

Various lower courts have found that prison officials have a constitutional duty to return property entrusted to them and that unjustified misappropriations by prison officials may be remedied by §1983. See, e.g., Jensen v. Klecker, 599 F.2d 243 (8th Cir. 1979); Alexanian

v. N.Y. State Urban Corp., 554 F.2d 15, 17 (2nd Cir. 1977); Sell v. Parratt, 548 F.2d 753 (8th Cir.), cert. denied, 434 U.S. 873 (1977); Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Carroll v. Sielaff, 514 F.2d 415, 417 (7th Cir. 1975); Hansen v. May, 502 F.2d 728, 730 (9th Cir. 1974); Russell v. Bodner, 489 F.2d 280 (3rd Cir. 1973). Prior to the "taking" of Mr. Taylor's hobby kit in 1975, the Court of Appeals for the Eighth Circuit had upheld at §1983 action filed by an individual who claimed that a local sheriff had wrongfully failed to return property that was taken from him at the time of his arrest. Cruz v. Cardwell, 486 F.2d 550, 551 (8th Cir. 1973).

The taking of a prisoner's property by the state is analogous to the situation in which a state takes the property

of a non-prisoner. Unless it is legitimately exercising its police powers, it is unconstitutional for a state to permanently deprive its citizens of property which the state holds in its custody. See Webb's Fabulous Pharmacies v. Beckwith, 49 U.S.L.W. 4033 (Dec. 9, 1980). In Beckwith, it was held that the retention by state officials of interest that accrued on interpleaded funds was a "taking" which violated the Fifth Amendment. The Court reasoned that the retention of the accrued interest was unconstitutional because there was "no police power justification offered for the deprivation." Id. at 4035. The plaintiff in Beckwith did not contend that the State of Florida had no right to require the initial deposit of funds with the court pending the disposition of the

case. Rather, the plaintiff successfully contended that the state's failure to return the interest amounted to an unconstitutional deprivation.

As in Beckwith, the State of Nebraska required Mr. Taylor to entrust his hobby kit with state officials. Unlike "auto accidents, personal injuries, and road repair," (Brief for Petitioners at 20), the property at issue was intentionally taken from Mr. Taylor. After the inmates assigned to the hobby center received the hobby kit, they intentionally stored it and intentionally transported it within the prison system. While Mr. Taylor was in Deadlock, the hobby kit was intentionally withheld from him. The fact that the Petitioners had an established procedure for delivering property to prisoners indicates that they foresaw that they would store

such property. (Petition for Certiorari, Appendix A).

Even if the "taking" in this case was an unintentional act, this Court has not adopted the proposition that only willful takings are constitutional violations. As Mr. Justice Stewart stated: "[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate...." Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring), quoted in, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 331 (1973) (emphasis added). The reach of the Fourteenth Amendment is not limited to intentional takings without due process of law. "Its purpose, more

particularly, is to protect ... use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property...." Fuentes v. Shevin, 407 U.S. 67, 81 (1972); Carey v. Piphus, 435 U.S. 247, 259-60 (1978).

Contrary to the position of the Petitioners (Brief for Petitioners at 8-9), the focus is on the detriment to the individual, rather than on the benefit to the state, in determining whether there has been a deprivation of property without due process of law. As this Court noted, "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors, 323 U.S. 373, 378 (1945). The fact that "[t]he current possessors of the property

in question, and the purpose to which it has been put, remains a mystery" (Brief for Petitioners at 9) should, therefore, be irrelevant in deciding whether or not there has been a constitutional deprivation.

Like the lower courts which decided the case at bar, various courts have held that public officials have a constitutional duty to return property which they hold as custodians. A plaintiff may recover damages from a customs official who fails to deliver his property in a timely fashion. See State Marine Lines Inc. v. Shultz, 498 F.2d 1146, 1155 (4th Cir. 1974). Likewise, in Clayton v. Shaw, 548 F.2d 1155 (5th Cir.), cert. denied, 434 U.S. 873 (1977), the Court of Appeals for the Fifth Circuit held that a court clerk has a constitutional duty to return seized

evidence, and his failure to do so gives rise to a §1983 claim for relief. The Fifth Circuit has also ruled that a policeman has a constitutional duty to return to the plaintiff a car that he impounded without notice. Bunkley v. Watkins, 567 F.2d 304 (5th Cir. 1978). Like these other public officials who hold the property of citizens in a custodial capacity, the Petitioners are in a unique position to violate the trust reposed in them. A reason for the imposition of liability in these situations was well stated long ago in a case which held that bonded depositories of public funds were strictly liable for any lost money.

> Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation

> of this condition would open the door to frauds, which might be practiced with impunity.

United States v. Prescott, 44 U.S. (3 How.) 578,88 (1845). It is important for this Court to recognize the right that prisoners have to their property. It would be patently unjust if the State of Nebraska were permitted to take Mr. Taylor's hobby kit and not return it.[1/] Indeed, one cause of the seething anger of prisoners is that their property is often abused and taken by prison officials.

1/ Since Mr. Taylor sued the Warden and the Hobby Manager in their official capacities, his action could be construed as a claim against the State of Nebraska for the return of the hobby kit or its value. Ex Parte Young, 209 U.S. 123 (1908). Amicus is of the view that a better result would occur if the Fourteenth Amendment was interpreted to override the Eleventh Amendment to allow such compensation through 42 U.S.C. Section 1983. Property rights have been viewed traditionally as at the core of the 14th Amendment. This Court has recognized

(Footnote continued on next page)

II. THE RESPONDENT HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Contrary to the assertions of the Petitioners (Brief for Petitioners at 12), the existence of the Nebraska State Tort Claims Act, Neb. Rev. Stat.,

---

(Footnote #1 continued from previous page)

that the 14th Amendment requires that the States cannot take property without making just compensation. At least in cases like this one when the State refuses to make any offer to pay for the property taken, and the State has not fully waived its sovereign immunity in its own courts to such claims. Section 1983 should provide direct access to the federal courts. Amicus believes that such a result is required by the categorical language and purposes of Section 1983 and sound policy for a well ordered relationship between the need to provide meaningful remedies for prisoners who have been wronged by prison officials and the protection of prison officials' proper administrative judgment in running prisons without an undue threat of federal court actions. However, amicus recognizes that this Court would require carving an appropriate narrow exceptions to the broad rulings in Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979). But see Hutto v. Finney, 437 U.S. 678 (1978).

§81-8, 209 et seq., does not necessarily provide the Respondent with his measure of due process. While the existence of a post-deprivation remedy may satisfy due process in circumscribed situations, a post-deprivation remedy does not satisfy due process if it does not provide meaningful relief. For example, in Goss v. Lopez, 419 U.S. 565 (1975), this Court found that an Ohio statute which purported to give suspended school children a remedy did not satisfy due process because, in most circumstances, the statute did not give the suspended student a remedy. Id. at 581 n.10. Similarly, in Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 19-21 (1978), it was found that the theoretical availability of remedies to consumers whose gas had been turned off by a city owned utility did not satisfy due process,

because the remedies were too expensive for the average consumer to pursue.

In analyzing whether or not Nebraska has available an adequate remedy, it is significant that prior to the commencement of his §1983 action, Mr. Taylor made many good faith attempts to recover his property. As was stipulated

> Over a considerable period of time plaintiff made numerous inquiries and requested assistance in tracing his packages. None of the efforts of the persons so contacted were productive of any further information regarding the disposition of said packages.

(Petition for Certiorari, Appendix A). Only after Mr. Taylor was unable to obtain relief through the grievance route did he bring this action.

Despite the failure of the prison grievance system, the Petitioners urge that the Nebraska State Tort Claims Act, Neb. Rev. Stat., §81-8, 209 et seq., provides Mr. Taylor with due

process. It is apparent from the face of the statute, however, that its sovereign immunity may still bar recovery in the instant action. Specifically, the statute denies recoveries where a claim arises with respect to "the detention of any goods or any merchandise by any law enforcement officer." Neb. Rev. Stat., §§81-8, 219(b). The State of Nebraska may well argue that this provision immunizes it from suits by prisoners who have deposited property in the custody of prison officials. Moreover, the Nebraska State Torts Claims Act bars recovery when the loss was caused by a state official acting in a "discretionary" capacity. As this Court has noted, the distinction between discretionary acts of government officials and ministerial acts of government officials is murky. Owen v. Independence,

445 U.S. 622, 648 n.31 (1980); see Brown v. Omaha, 183 Neb. 430, 434-35, 160 N.W.2d 805, 808 (1968). The State of Nebraska may, therefore, attempt to shield itself from liability by arguing that all acts the warden undertook in a supervisory capacity to implement the prison mailing system were discretionary.

In Ingraham v. Wright, 430 U.S. 651 (1977), this Court suggested that there may well not be a deprivation of a liberty interest without due process of law if the state which deprived the plaintiff of his liberty interest consented to being sued for the deprivation. The approach taken in Ingraham, however, assumes the existence of a meaningful state remedy. Id. at 678 n.46. Because Nebraska has retained a significant measure of sovereign

immunity, no such remedy exists in this case. Thus, even under the approach to due process suggested in Ingraham, Mr. Taylor has been deprived of his hobby kit without due process of law.

Those deprived of their constitutional rights have not been required to exhaust their state judicial remedies before bringing an action under 42 U.S.C. §1983. Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Steffel v. Thompson, 415 U.S. 452, 472-473 (1974). Rather, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). Thus, the theoretical availability of a Nebraska remedy is an insufficient basis for foreclosing Mr. Taylor's federal remedy when his constitutional rights have been invaded.

III. REGARDLESS OF THEIR VALUE, PROPERTY RIGHTS ARE PROTECTED UNDER THE FOURTEENTH AMENDMENT AND UNDER SECTION 1983.

There is no language in either 42 U.S.C. §1983 or in 28 U.S.C. §1343(3) which suggests that only property having a specified, minimum market value is protected by those sections. When an individual alleges that a state has deprived him of property without due process of law, jurisdiction over the claim is conferred upon the federal courts by 28 U.S.C. §1343(3). Lynch v. Household Finance Corp., 405 U.S. 538, 543 (1972). Unlike other statutes which grant jurisdiction to the federal courts, 28 U.S.C. §1343(3) contains no amount in controversy requirement. Rather, jurisdiction lies whenever the "underlying substantive right that was allegedly violated ... was conferred by the Constitution ...." Maher v.

Gagne, 100 S.Ct. 2570, 2574 n.11 (1980). Amicus contends that Mr. Taylor's right to his hobby kit is a right that is conferred by the Constitution.

Generally, all property is protected from state deprivations by the Fourteenth Amendment. See North Georgia Finishing Inc. v. Di-Chem Inc., 419 U.S. 601, 608 (1975); Fuentes v. Shevin, 407 U.S. 67, 89-90 (1972). Since he was deprived of many of his liberty interests, the imprisoned Mr. Taylor may have placed a greater value on his hobby kit than he would have if he were a free man. Bonner v. Coughlin, 517 F.2d 1311, 1314, n.11 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978). It would be unfair if a state were permitted to take a prisoner's property without compensation

merely because those outside the prison placed a lower value on it. See Ferranti v. Moran, 618 F.2d 888, 891 (1st Cir. 1980); Pritchard v. Perry, 508 F.2d 423, 425 (4th Cir. 1975).

Indeed, it would be inconsistent with both the Fourteenth Amendment and common sense if a state were permitted to take a person's possessions - even those which have a relatively small market value - and then refuse to return them.

IV. THE PETITIONERS SHOULD BE HELD LIABLE FOR THE LOSS CAUSED BY THEIR NEGLIGENT SUPERVISION OF THE PRISON HOBBY SYSTEM.

A. Negligence Should Be A Sufficient Basis For Liability In These Circumstances.

Amicus contends that this is not an appropriate case for a decision on whether simple negligence is sufficient to establish liability under

§1983. As amicus interprets it, this case presents only the narrow question: Is a §1983 remedy available when a state detains the property of prisoners and others who are institutionalized and then fails to return it to them? This Court has noted the difficulty of fashioning a rule which would cover all negligent acts and has implicitly recognized that the duty of care owed by public officials varies with the circumstances. See Baker v. McCollan, 443 U.S. 139-40 (1979). It may be argued that in situations where state officials do not have as great a duty of care, simple negligence may not be a sufficient basis for liability under §1983. Amicus asserts, however, that state officials undertake a high duty of care when they hold property in trust, and that the failure to return

such property amounts to a constitutional deprivation.

There is nothing in either the language of 42 U.S.C. §1983 or in the cases that have construed it which compels the conclusion that simple negligence can never be a sufficient basis for liability under that section.

> By the plain terms of §1983, two- and only two-allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167, 171 (1961).

Gomez v. Toledo, 100 S.Ct. 1920, 1923 (1980); see Owen v. Independence, 445 U.S. 622, 652 (1980). Particularly in situations when it is easy for a state to misuse its power, such as when it holds property in trust, negligence should be a sufficient basis for liability under §1983.

The imposition of liability in situations when the state holds an individual's property and then fails to return it comports with the twin purposes of a §1983 damage remedy, i.e., compensating victims of constitutional deprivations and deterring violators of constitutional rights. See, e.g., Owen v. Independence, 445 U.S. 622, 651 (1980); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Carey v. Piphus, 435 U.S. 247, 254 (1978). It may be argued that a damage remedy will not deter negligent conduct. That notion, however, was recently rejected: "[T]he threat that damages might be levied ... may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional

rights." Owen v. Independence, 445 U.S. 622 at 652. See also Carlson v. Green, 446 U.S. 14, 21 (1980).

Even if the imposition of liability on the Petitioners should increase the federal court caseload, an increased burden on the federal courts is not in itself a sufficient basis for denying a remedy to an individual whose constitutional rights have been abridged. Davis v. Passman, 442 U.S. 228, 248 (1979); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (Harlan, J., concurring). Indeed, the increase in the courts' caseload will not be significant because only those who have entrusted their property to the state and have been denied compensation will be affected by this decision.

B. The Petitioners Negligently Supervised The Prison Mailing System.

The district court property concluded that the Petitioners were liable for their negligent failure to supervise. As the court below stated:

> The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in loss of personal property for Mr. Taylor, which loss should not go without redress.

Taylor v. Parratt, No. 76-L-57 (D.Neb. Oct. 25, 1978). The court based its finding on the stipulations and the facts presented below and amicus asserts that the court properly drew the inference of negligence.

The reasons for the application of the doctrine of res ipsa loquitur are present here. Mr. Taylor is now unable to identify precisely what happened to his hobby kit. His inability to determine the cause of his loss,

however, is only a natural consequence of his confinement, see Fayerweather v. Bell, 447 Supp. 913, 916-17 (M.D. Pa. 1978), and should not be a sufficient reason to deny him the right to recover. To alleviate the difficulty facing the injured plaintiff without access to sources of proof, he should be allowed to use the doctrine of res ipsa loquitur "as an aid ... in sustaining the burden of proving breach of the duty of care...." Commercial Corp. v. N.Y. Barge Corp., 314 U.S. 104, 113 (1941).

The conditions for recovery under res ipsa loquitur are well known and are delineated by Prosser:

> (1)[T]he event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agent or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Some courts

> have at least suggested a fourth condition, that evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

W. Prosser, Handbook of the Law of Torts, 214 (4th Ed. 1971). Res ipsa loquitur has been used as a basis for liability in cases, such as the one at bar, in which plaintiffs seek to recover for losses caused by the defendant's negligent failure to supervise. Texas Pipe Bending Co. v. Gibbs, 580 S.W.2d 41, 45-6 (Tex. Civ. App. 1979); Fogal v. Genesee Hosp., 41 A.D.2d 468, 344 N.Y.S. 2d 552 (4th Department 1973).

The application of res ipsa loquitur will not make prison officials insurers against all losses suffered by prisoners.[2/]

2/ Because the prison officials exercised exclusive control over the lost hobby kit, the case at bar is distinguishable from Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976),

(Footnote continued on next page)

Although res ipsa loquitur establishes a prima facie case, it does not shift the burden of persuasion from the plaintiff. Thus, if the Petitioners are

---

(Footnote #2 continued from previous page)

cert. denied, 435 U.S. 932 (1978). In Bonner, the court denied a Section 1983 cause to a prisoner who lost his trial transcript after prison officials had left his cell door open. In Bonner, however, the property lost was originally in the prisoner's cell and was not in the custody of prison officials. Moreover, there was no clear causal link in Bonner between the acts of state officials and the prisoner's loss of property. 545 F.2d 565 at 567. Indeed, the loss of the transcript could have been caused by the acts of other prisoners or by the negligence of the plaintiff himself. In sharp contrast to Bonner, however, the loss in the case at bar could only have been attributed to the supervision of the officials. As was stipulated, all incoming packages are kept in the custody of the Nebraska Penal Complex until such time as they are delivered to the addressee. Only in exceptional circumstances, none of which were present here, are the packages delivered to someone other than the designated recipient. Thus, state officials maintained sole control of incoming mail until such time as it is delivered to the designated prisoner, and any loss which occurs prior to the delivery is, therefore, traceable to prison officials.

able to raise sufficient doubts about the validity of the inference of negligence, Mr. Taylor would not be permitted to recover. See Southern Ry. v. Prescott, 240 U.S. 632, 640 (1916); Prosser, supra, at 231.

A finding that the Petitioners negligently failed to supervise should not be barred by the holding of Monell v. New York Department of Social Services, 436 U.S. 658 (1978), that §1983 liability cannot be imposed on the basis of respondeat superior. There is an important difference between respondeat superior and supervisory liability. Whereas liability is imposed under respondeat superior "solely on the basis of the existence of an employer-employee relationship with a tortfeasor," 436 U.S. 658, at 692, liability based on supervisory negligence is imposed because

the "failure to establish proper procedures or adequately train or supervise personnel led to the deprivation of prisoners' constitutional rights." McClelland v. Facteau, 610 F.2d 693, 696 (10th Cir. 1979). As the Court of Appeals for the Tenth Circuit stated in McClelland:

> Defendants argue that because the police chiefs had no personal knowledge of or did not participate or acquiesce in any of the alleged constitutional deprivations, they cannot be sued under Section 1983. ... We do not agree. A crucial difference exists between liability as a master (respondeat superior) and direct liability. Respondeat superior is a doctrine of vicarious liability based upon public policy - the notion that the person who benefits by the acts of the servant must pay for wrongs committed by the servant; the one held liable as master need not be at fault in any way. Under direct liability, plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of injury. The law clearly allows actions against supervisors under Section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color

> of law of a federally secured right. (citations omitted).

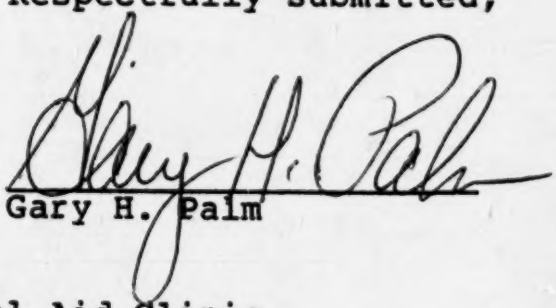
610 F.2d 693 at 695. See Navarro v. Chief of Police, Des Moines, 523 F.2d 214, 218 n.3 (8th Cir. 1975); Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972).

This Court suggested in Monell that §1983 could be based on supervisory liability. In drawing the contours of the immunity afforded principals by §1983 this Court stated that "the mere right to control without any control or direction being exercised without any failure of supervision is not enough to support §1983 liability." 436 U.S. 655, 694 n.58. By implication a supervisor may be found liable where he exercises actual control, but his failure to supervise leads directly to the constitutional deprivation.

CONCLUSION

For the aforementioned reasons the judgment of the Courts below should be affirmed.

Respectfully submitted,



Gary H. Palm

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University
Chicago, Illinois 60637
(312) 324-5181

Counsel for Amicus Curiae*

---

*Counsel would like to acknowledge the assistance of Jeremy A. Berman, a third-year law student at the University of Chicago Law School, in the preparation of this brief.